1957

Western States Refining Co. v. Blair Berry : Brief of Appellant

Utah Supreme Court

Earl D. Tanner; Attorney for Appellant;

IN THE SUPREME COURT

of the

STATE OF UTAH

WESTERN STATES REFINING COMPANY, a Utah corporation,

Plaintiff and Respondent,

—vs.—

BLAIR BERRY,

Defendant and Appellant.

Case No. 8602

APPELLANT'S BRIEF

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STATEMENT OF FACTS

On June 7, 1956, plaintiff commenced this action in the Second Judicial District Court for Davis County by serving a ten day summons on defendant. The complaint was filed in time and, thereafter, the defendant, appearing specially, filed a motion to quash service of summons on the ground that service was obtained by inveigling or enticing the defendant into the state of Utah by deceit, artifice or trick, and on the further ground that, under

the facts of this case, defendant was immune from service of summons at the time summons was served upon him. The trial court denied the motion to quash, defendant petitioned this court for permission to appeal from said interlocutory order and said permission was granted.

Defendant is a resident of the state of Idaho, has been such for more than thirty years and has never been a resident of the state ofUtah (R. 11). When this action was commenced he was the owner of one service station at Rexburg, Idaho, and leased a second service station at Rexburg from the plaintiff. The lease was embodied in a written agreement dated August 25, 1955, which also contained provisions which the plaintiff contends require the defendant to sell only the petroleum products of the plaintiff. On December 28, 1955, provisions were added relating to credit card charges. Beginning shortly after the first of 1956, and continuing to date, the parties hereto have disagreed over the interpretation of the terms of the said written agreements, and over whether plaintiff has been violating their terms. Plaintiff contends that said agreements require defendant to sell plaintiff's petroleum products exclusively and defendant contends that they do not. In addition, there has been a controversy in relation to the quality of the petroleum products being delivered to defendant by plaintiff under the agreements. These controversies are the subject of the suit commenced by plaintiff by the disputed service of summons.

The President of the plaintiff corporation is W. S. Wagstaff, who is also a member of the bar of this court. Plaintiff's General Sales Manager is Neal R. Olson and plaintiff's attorney at the time this action was commenced was Richard G. Boren, who was also a employee of the Sales Department under Mr. Olson.

Sometime around the 1st of June, 1956, Mr. Olson instructed Mr. Boren to make a trip to Idaho in the company of a Mr. Bruner, an Idaho managerial employee of the plaintiff, and among other things to contact the defendant at Rexburg, Idaho, to see if he could work out the differences and resolve the controversies existing between plaintiff and defendant. He instructed Mr. Boren that if he couldn't work out the differences, he should ask the defendant to come to plaintiff's plant at Woods Cross, Utah, for a conference so that everyone could sit down together and try to work out said differences (R. 47). Mr. Boren went to Idaho and, sometime during June 4, 5, or 6, stopped at the station of defendant and, in the company of Mr. Bruner, conferred with defendant in relation to the aforesaid items of controversy. There is a conflict between the testimony of defendant and Mr. Boren as to exactly what was said but, according to Mr. Boren, he told defendant that the plaintiff company was dissatisfied with defendant's leasing a station of plaintiff, building a station of his own and transferring the customers from plaintiff's station to defendant's, with defendant's selling products from other sources in contravention of their written agreement and with certain credit card changes (R. 63 and 64). No agreement could be

reached in relation to the items in controversy and Mr. Boren requested that defendant come to Salt Lake City and discuss these matters with the officers of the plaintiff company and attempt to settle the controversy. Defendant stated that he would do so as soon as it could be arranged.

In compliance with Mr. Boren's request, defendant, on June 7, 1956, drove directly from Rexburg, Idaho, to the offices of the plaintiff corporation at Woods Cross, Utah. The sole purpose of defendant's trip into Utah was the conference with the officers of the plaintiff company (R. 25), and, as soon as it was terminated he drove directly back to Rexburg (R. 17 and 18).

At the conference defendant discussed the items of controversy with Mr. Boren, Mr. Wagstaff, and Mr. Olson. While the conference was going on in Mr. Olson's office, Mr. Wagstaff, in his own office and out of the defendant's presence, instructed Mr. Boren to prepare a summons and have the same ready to serve on defendant if no agreement could be reached (R. 43). Pursuant to that instruction, Mr. Boren had a peace officer called to the plant and prepared the summons which was eventually served on the defendant. Mr. Royal A. Reynolds, North Salt Lake Township Marshal, came to plaintiff's office in response to said request, and waited for some time in the plaintiff's waiting room. When Mr. Boren felt that no agreement was being reached, he called Mr. Reynolds and had him come into the conference room and serve the summons upon the defendant. According to Mr. Boren, the defendant was surprised by the appear-

ance of the Marshal and the service of the summons (R. 61).

At the hearing on the motion to quash there was evidence presented in the form of the testimony of the plaintiff's officers indicating that the possibility of suing defendant had been given some consideration prior to the time he was invited to come to Utah. Mr. Boren, attorney for defendant at the time summons was served, indicated that he had given some thought to the question of whether defendant, being an Idaho resident, could be sued in Utah, and had been under the impression that, since it was an action on a contract, suit could be commenced in either jurisdiction. There is testimony that the possibility of suing defendant had been considered by Mr. Wagstaff, President of the plaintiff corporation, and by Mr. Olson, the Sales Manager prior to the invitation to the defendant. In these regards, however, it must be borne in mind that the ruling of the trial court denying the motion to quash would imply a finding that there was no enticement or inveiglement by means of deceit, artifice or trick. For this reason it must be assumed that the determinations of fact were against the position of this defendant.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS HEREIN BECAUSE AT THE TIME THE SUMMONS WAS SERVED ON DEFENDANT HE WAS IMMUNE FROM SERVICE OF SUMMONS IN THIS ACTION.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS HEREIN BECAUSE AT THE TIME THE SUMMONS WAS SERVED ON DEFENDANT HE WAS IMMUNE FROM SERVICE OF SUMMONS IN THIS ACTION.

Defendant contends that he was immune from service of summons at the time summons was served on him in this action for the reason that a nonresident who comes into the jurisdiction at the invitation or request of a resident for the sole purpose of conferring with the resident in regard to the settlement of a then existing controversy between them is immune from service of summons in a suit involving the controversy which was the subject of the conference, during his attendance at the conference and for a sufficient period thereafter to enable him to return to his home. This is the rule established by *State ex rel Ellan v. District Court of Eighth Judicial District in and for Cascade County et al.*, 97 Mont. 229, 33 P. (2d) 526, 93 A.L.R. 865, decided in 1934, a case which is exactly in point with the instant case.

In the *Ellan* case, supra, Nicholas Ellan (who, like the defendant here, was a resident of the state of Idaho) was involved in a controversy with a construction firm called House and Comerford, and with one Sam Orino, in relation to the rental of certain trucks and equipment belonging to Ellan which were used by House and Comerford as subcontractors under a prime contract let by the

state of Montana to said Sam Orino for the construction of certain highways in Montana. Ellan claimed rental for the machines and House and Comerford denied liability and counterclaimed. At House's request Ellan accompanied House from Idaho to Montana, and the declared object of the trip was a conference with Orino and the officers of the Montana Highway Commission in an effort to settle the controversy. House and Ellan arrived at Helena, Montana on December 7, and on December 8 Ellan was served with summons and a copy of the complaint in an action by House and Comerford concerning the controversy which was the subject of the proposed conference. Ellan appeared specially in the action and moved that service be quashed on the ground that he was enticed into the state of Montana for the purpose of service by a promise of compromise and settlement of the controversy between him and the plaintiffs. In his affidavit on said motion to quash Ellan stated that House made false and fraudulent representations to him under pretense of discussing a compromise for the purpose of enticing him into the State in order to secure service on him, and House, in his counter-affidavit, stated that he was acting in good faith and in the belief that a compromise could be effected. The trial court found in favor of House and Comerford and against Ellan and denied the motion to quash. Ellan sought and secured a writ of prohibition from the Supreme Court of Montana. The opinion was written in the action for the writ of prohibition.

Much of the case involves the question of whether prohibition will lie under such circumstances and the

Montana court determined that it would. The court then moved to a consideration of the question of whether the service of summons on Ellan could be sustained and concluded that, even giving full credit to the finding of the trial court that there was no fraud or misrepresentation, the summons must be quashed. The court pointed out that it taxed their credulity to the utmost to give credit to the finding of good faith and honest purpose on House's part in bringing Ellan into the state of Montana but stated further that, since the trial court had determined the conflict in the evidence on the subject of good faith in favor of House, they would accept that finding and give it full cognizance. The balance of the opinion is as follows:

> "The general rule is that when a non-resident party to an action, or a witness, comes into the state for the sole purpose of attending a trial, he is immune from the service of process during his attendance and for a reasonable period thereafter to enable him to return to his home. Stewart v. Ramsay, 242 U.S. 128, 37 S. Ct. 44, 61 L. Ed. 192; Page Co. v. Macdonald, 261 U.S. 446, 43 S. Ct. 416, 67 L. Ed. 737; State ex rel. Coe v. District Court, supra. According to the weight of authority, this rule applies to all proceedings which are in their nature judicial, whether taking place in court or not (50 C.J. 554, and cases cited), and to attendance upon the taking of depositions to be used in the trial of a cause (50 C.J. 555, and cases cited). The rule has been extended to include a party attending the examination of witnesses to be used on a trial of his case (Plimpton v. Winslow [C.C.] 9 F. 365), and to such a one who comes into a foreign jurisdiction, at the request of his counsel,

to be present during the argument on a demurrer (Kinne v. Lant [C.C.] 68 F. 436).

"The question before us is usually treated under the head of fraud and deceit in enticing a nonresident into the jurisdiction in order to secure service upon him, and it is said that the service should be set aside when the defendant is procured to come into the jurisdiction by pretense of settlement. 50 C.J. 488; Olean St. Ry. Co. v. Fairmount Construction Co., 55 App. Div. 292, 67 N.Y.S. 165; Higgins v. Dewey (City Ct.) 13 N.Y.S. 570; Cavanagh v. Manhattan Transit Co. (C.C.) 133 F. 818, 819; Alderson on Judicial Writs and Process, § 126.

"We can conceive of no valid reason for the differentiation. The law favors the compromise and settlement of disputed claims (12 C.J. 336), and should protect a nonresident who comes into this state at the solicitation of his adversary for the purpose of attempting such a disposition of a controversy, to the same extent as when one comes here as a party to, or a witness in, a case in court. As was said in Allen v. Wharton, 59 Hun. 622, 13 N.Y.S. 38, 39, respecting a situation similar to that in the case at bar: 'Good faith on the part of the plaintiff required that he should have permitted the defendant again to leave this city without making service of the summons when it became evident that no settlement would be effected through his agency. That was violated in making the service which was made upon him. It was a breach of the confidence which had been inspired * * * and the settled practice requires that the service of the summons made, as this was made, should not be permitted to stand.' While there, as here, the trial court found in favor of the plaintiff on conflicting testimony, the appellate court in

applying the 'enticement' rule said that at the time the plaintiff invited the defendant to come to the state for the purpose of discussing a compromise or settlement, there probably lurked in his mind the idea of suit and service if settlement was not effected. This declaration detracts from the rule announced, and we think it unnecessary to find the lower court's finding of good faith is not justified by the evidence, but that the general rule of immunity should apply.

"Federal Judge Van Fleet, of California, in discussing the general rule, has said: 'Originally it was asserted solely as the privilege of the court for the protection of its own jurisdiction, but later as that of the person concerned as well. Bacon's Abr. tit. 'Privilege.' What the precise limits of the right were in its earlier history, or those to whom extended, it is not very material to here inquire. * * * While it is quite true that the right has most frequently arisen and been applied in connection with parties and witnesses in judicial proceedings, its extension in the process of time to those engaged in other departments of the public service has been more largely by analogous application by the courts than as a result of legislation.' Filer v. McCornick (D.C.) 260 F. 309, 314.

"Quoting from Stewart v. Ramsay, supra, it is said: " 'Now, this great object in the administration of justice would in a variety of ways be obstructed if parties and witnesses were liable to be served with process while actually attending the court. It is often matter of great importance to the citizen to prevent the institution and prosecution of a suit in any court at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if capi-

as might be served upon him. This is especially the case with citizens of neighboring states, to whom the power which the court possesses of compelling attendance cannot reach.' It is these considerations which have actuated the courts in extending the protection of the rule, so limited in the beginning, until it has come to embrace practically every one who may be called to a strange jurisdiction in connection with a cause, and every proceeding or step in the action, either heard before the court or any of its officers."

"A bona fide attempt to compromise and settle a controversy without the trouble and expense of the institution of suit and the trial of the cause is a more important step in connection with the cause than argument of a demurrer or the taking of a deposition for the preservation of testimony, and the general rule as to immunity should be extended to cases wherein, as here, a party to a controversy has been induced for this purpose to come within rifle range, as it were, under a flag of truce; if the purposes of the parley is not accomplished, honor and fair dealing should dictate that such person be permitted a reasonable time within which to return to the safety of the position from which he was induced to withdraw, before his adversary goes into action." (Italics added.)

This decision was annotated in 93 A.L.R. at page 872, and several cases are there discussed which are similar to the instant case, but in all of those cases the courts appear to have concluded that fraud must be shown in order to warrant the setting aside of the service of summons, and then to have concluded that inviting a nonresident into the state for the purpose of discussing settle-

ment of a controversy and then serving him with summons in a suit involving the controversy which was concerned in the invitation to come into the state, was, in and of itself, sufficient fraud to warrant setting aside the service of summons. As this defendant reads the decision in the Ellan case, the Montana Supreme Court is singular and outstanding in that it holds that a summons served under these circumstances should be quashed whether or not fraud is found to exist.

It should be noted that the case at bar in this state involves the exact question which was involved in the Ellan case. A nonresident was invited into a foreign state to discuss settlement of a pending controversy. While in the foreign state for the sole purpose of the discussion of settlement, the nonresident was served with summons. He challenged the service of summons on the ground that it was obtained by trick and artifice and the trial court found that there was no trick or artifice. The question is, then, whether the state of Utah will extend the doctrine of immunity from service of summons to the case at bar. This could be done on the same ground adopted by all of the other courts except the Montana court, that is, a finding that the facts shown are sufficient to make out the requisite fraud for setting aside the service of summons or, in the alternative, upon the ground that public policy requires that a nonresident, invited into the state for purposes of discussing the settlement of an existing controversy, be immune from service of summons while coming into the state, during the negotiations, and for a sufficient time thereafter

to enable him to return to the state of his residence. The appellant urges that this court abandon the circuitous route, refuse to give lip service to the fiction of actual fraud and state that the circumstances of this case require the summons to be quashed on the ground of immunity from service of process.

Subsequent to the decision of the Ellan case, supra, a number of jurisdictions have referred to it, but in no instance has the case at bar been on all fours with the Montana case, and in no case has it been overruled or rejected.

The Supreme Court of the State of Iowa in *Moseley v. Ricks,* 274 N.W. 23, goes carefully into the rationale behind the principle of law extending immunity from service of process to persons who are within the state as parties or witnesses in judicial proceedings. In a substantial majority of the jurisdictions immunity has been extended to proceedings which are not *strictly judicial proceedings.* This extension is discussed at 35 A.L.R. 1353, wherein Utah is cited as a state which follows the rule extending the immunity from service to include persons who are within the state as parties or witnesses in a proceeding which is not strictly judicial. See *Cooke v. Cooke,* 67 Utah 371, 248 P. 83, decided in 1926. The said Cooke case involves a very long opinion and the only point of interest to us here is Point 18 of the syllabus. This case is cited to show that Utah follows the more liberal rule in this regard and it is not contended that the Cooke case is determinative of the issues before the court in the instant matter.

After the determination of *Moseley v. Ricks,* supra, the Supreme Court of Iowa was again called upon to discuss the holding of the Ellan case. In *Lingo v. Reichenbach Land Company et al.,* 27 N.W. 121, counsel for the defendant claimed to come within the protection of the doctrine advanced in the Ellan case. The Iowa court held that the facts were dissimilar and the summons should not be quashed. In discussing the Ellan case, however, the Iowa court indicated that the Supreme Court of Montana had really held that bad faith or fraud was required and had found that it existed in the case before it. Appellant cannot agree with this interpretation.

In *Lingo v. Reichenbach Land Company et al.,* supra, the nonresident defendant, Reichenbach, was the plaintiff in a case then pending in another county in Iowa. His counsel in that case got in touch with the counsel for the defendant and requested a meeting between Reichenbach, himself and them. The stated purpose of this conference was to be a discussion of settlement in the other matter. There was no discussion of the Lingo controversy. The meeting was held in Iowa and the case then pending in the other county was discussed, but no agreement was reached. When he left the office where the conference was held, Reichenbach was served with a summons in the Lingo suit. The attorneys for Lingo were the same attorneys with whom the conference had just been held. The Supreme Court of Iowa carefully and clearly pointed out first, that the meeting to discuss settlement was brought about and arranged by

Reichenbach's attorney, not Lingo's, and the situation was not one where a resident plaintiff had invited a nonresident defendant to come into the state to discuss settlement, and second, that the action in which the suit was brought involved a wholly different matter from that in regard to which the conference was held. These facts distinguish the Lingo case from the Ellan case. As appellant reads the Lingo case he gets the impression that the Supreme Court of Iowa would quash service of summons in a case such as the Ellan case, and in the case at bar, but would do so upon the grounds that the facts shown are sufficient to constitute enough bad faith to vitiate the service.

Appellant finds no case involving an invitation by a resident to a nonresident to come in the state for the purpose of attempting to settle an existing controversy, the failure of the settlement discussion, and the service of summons in a suit on the same controversy, in which the court concluded that the summons was properly served and should not be quashed.

Although the trial court apparently found against it, there is testimony of plaintiff's officers and agents in the record from which it could have been found that the invitation to defendant and the subsequent service of summons were not wholly in good faith. W. S. Wagstaff, President of the plaintiff corporation, stated (R. 44) that he had contemplated the possibility of legal action against Mr. Berry around the first of the year, 1956. Mr. Olson, (R. 49) the General Sales Manager for the plaintiff, in a

portion of his deposition which was introduced because of a conflict between it and his testimony at the hearing, gave the following testimony indicating that the possibility of suing Mr. Berry had been discussed prior to the invitation to come to Utah, and that there had been some discussion of Mr. Berry's nonresident status, as follows (R. 49 and 50):

"Mr. Tanner: (Reading)

Q. During this period of time, during the first five months, that would be up until June 1st, 1956, did you contemplate the possibility of suing Mr. Berry over the points of difference between the Company and Mr. Berry?

A. Yes, I think so.

Q. Did you discuss that with anyone?

A. Yes, I discussed it with Mr. Wagstaff.

Q. Did you discuss it with Mr. Boren?

A. Yes.

Q. When would that discussion have taken place to the best of your recollection?

A. I couldn't give you a date on that. I don't know.

Q. It would have been prior to June 1st, wouldn't it?

A. Yes.

Q. And had you personally concluded that it may be necessary to sue him?

A. I think that I felt there was a good possibility that we would have to sue him.

Q. So that subject had been in your mind prior to June 1st?

A. The possibility of it, yes.

Q. Have you ever discussed with Mr. Boren or Mr. Wagstaff whether such a suit could be brought in the state of Utah or not?

A. I don't quite understand your question.

Q. What I am driving at is this: Mr. Berry lives in Idaho and the Company is here in Utah. Have you ever discussed with either Mr. Wagstaff or Mr. Boren whether suit, if brought, would have to be brought in one place or the other?

A. I think there was some limited amount of discussion on that point.

Q. Do you remember the nature of it?

A. It would be very vague."

Mr. Boren, again in a portion of a deposition introduced because of a conflict between it and the testimony at the hearing, testified as follows (R. 60):

"Q. Did you ever advise Mr. Berry prior to the time he was served with summons in this action that he could expect suit to be brought against him?

A. No, I don't think so. I might qualify that by saying we never came right out and told him we would sue him."

CONCLUSION

Defendant respectfully requests this court to reverse the ruling of the trial court and hold that the motion to

quash should be granted under the facts and circumstances of this case for the reason that the defendant was immune from service of process in this case while in Utah in response to the invitation of the plaintiff to come to Utah and discuss settling the controversy which is the subject of this suit. In this regard it should be again pointed out that the sole purpose of the defendant in coming into the state of Utah was to confer with the officers of the plaintiff in regard to the settlement of this controversy, that, upon entering the state he drove directly to plaintiff's place of business and that, upon leaving, he went directly from plaintiff's place of business back to Rexburg, Idaho.

Appellant further contends that, in the event this court feels that bad faith is an essential prerequisite to the quashing of service of summons, it should hold that serving summons on a nonresident who has come into the state at the request of the plaintiff for the sole purpose of discussing settlement of the controversy sued on is sufficient evidence of bad faith to invalidate the service.

Respectfully submitted,

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